U. S. | JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1961

No. 331

THE SHELL PETROLEUM CO., LTD.,
as owner of the m/s LEMBULUS,
Petitioner,

—against—

CHARLES PESCHKEN,
Respondent,

and

CANOLIUS V. HINES and
FRED W. BENTS

REPLY BRIEF OF PETITIONER, THE SHELL PETROLEUM CO., LTD., TO THE BRIEF IN OPPOSITION OF RESPONDENT CHARLES PESCHKEN

ROBERT M. JULIAN,
Counsel for Petitioner,
80 Broad Street,
New York 4, N. Y.

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POINT 1.

THE STATE OF NEW JERSEY'S ASSERTION OF SOVEREIGN IMMUNITY, BY ITS ATTORNEY GENERAL, COUNSEL FOR THE RESPONDENT HEREIN, WHEN COUPLED WITH THE MANNER IN WHICH THE STATE OF NEW JERSEY MAINTAINS, OR, RATHER, FAILS TO MAINTAIN, BRIDGES USED IN COMMERCE CONSTITUTES AN UNREASONABLE RESTRAINT UPON INTERSTATE COMMERCE.

Respondent, through the Attorney General, argues that he cannot be held liable for the admitted defect in the lifting mechanism of the bridge because it is owned by the State of New Jersey (p. 16). It seems clear that if suit could have been brought against the State of New Jersey the State would have been held liable for, first, permitting

a bridge across a navigable stream to become defective and, second, for continuing to operate said bridge in a defective condition.

We thus have a situation where the State operates bridges throughout the entire State of New Jersey, and, under the doctrine of sovereign immunity, can do so in such a fashion as to create an unreasonable risk to those engaged in interstate commerce. The assertion of sovereign immunity makes it all the more important to review the acts or omissions of the bridge tender and the decision of the Court of Appeals as they relate to the acts and omissions of the State of New Jersey.

POINT II

RESPONDENT APPARENTLY AGREES THAT THERE IS A CONFLICT BETWEEN THE SECOND AND THIRD CIRCUITS.

Respondent urges (p. 35) that the decision in *Circle Line Sightseeing Yachts* v. *City of New York*, 283 F. 2d 811 (2 Cir., 1960) be ignored and restricted to its peculiar facts. It should be remembered that in that case 258 persons were aboard, 87 were injured, 32 persons—including 5 on stretchers—were taken to hospitals and one died.

We submit that this Court should not ignore a case illustrating the dangers resulting from lack of appropriate signals; a case that reveals the impact of a collision upon the welfare of 87 injured persons.

The Second Circuit stated (p. 814):

> "The failure to provide an adequate signal system was similarly negligence and a proximate cause of the collision. That Army regulations relating to the bridge do not require any warning system, other than an exchange of whistle signals with the boat seeking to pass, does not excuse the City's conduct * * *."

Respondent labels a simple two blast signal as a "warning" but it is interesting to note that nowhere in his brief does respondent discuss the State of New Jersey's bridge regulations which, in Rule 2, specify that a two blast signal is to be repeated at intervals (Exh. P 13e, 1f). Nor does respondent discuss the City of New York's regulations which provide that the two blast signal "shall be repeated until acknowledged by the boat." (13c).

It is obvious from the foregoing that a one two-blast signal is not a "warning" of danger; that both the State of New Jersey and the City of New York recognize that the Army regulations do not provide a specific warning or danger signal, and found it necessary to supplement the Army regulation by adopting their own type of signal holding give warning of imminent failure or potential failure naviga-

The Second Circuit was correct, we submit, in ho opening that the bridge tender must give specific warning to na tion of a danger existing on or in connection with one bridge a bridge. pondent.

In this case the State of New Jersey required the b signal. tender to sound a two blast signal repeatedly. Respon however, did not give that or any other warning sign .

POINT III.

ISSUES

ECTING,

RESPONDENT ATTEMPTS TO CLOUD THE ISS OF FACT OF LAW PRESENTED BY THE PETITION BY INJECT URT IN IN COUNTER-QUESTION NUMBER 2, QUESTIONS OF RE NOT WHICH WERE RESOLVED BY THE DISTRICT COUR THE PETITIONER'S FAVOR, AND WHICH WERE EVEN DISCUSSED BY THE COURT OF APPEALS.

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The Court of Appeals unequivocally stated at the cor sion of its opinion: essary to s to pro-

> "Our view of the case makes it unnecessary decide at what point the vessel turned so as to

> ceed bow foremost downstream. It is also unnecessary for us to consider the disputed question of the speed of the LEMBULUS as she approached the bridge. Whether she was going fast or slow does not matter because she disobeyed the rule, whatever was her speed."

The decision of the Court of Appeals turned on one fact and one fact only, namely, that the bridge gave one two-blast signal and because of that signal the substantive rights of navigation were so obliterated that the entire onus of proceeding was transferred from the bridge to the vessel regardless of any other existing circumstances such as whether a ballasted tanker could be stopped under adverse weather conditions upon receipt of the signal.

Respondent's brief, while couched in somewhat different language, is essentially a rehash of argument of fact made to the District Court upon conclusion of the trial and repeated in support of a motion for a rehearing or for a new trial.

Every innuendo, every inference and every miasma urged upon the Trial Judge is repeated in opposition to this petition for a writ of certiorari, and, in addition, is replete with afterthoughts and misstatements.

Respondent's arguments and statements of alleged facts were all decided against him and have absolutely no relevance here and, furthermore, are inappropriately made to cloud the questions of law presented to this Court.

POINT IV.

ACCEPTANCE OF THE CONSTANT USE OF A TWO BLAST SIGNAL FOR WHAT IT IS, NAMELY, A MEANINGLESS SIGNAL, DOES NOT ESTABLISH A NEW PRINCIPLE OF LAW AS ARGUED BY RESPONDENT BUT IT IS IN REALITY A QUESTION OF FACT TO BE CONSIDERED BY THE TRIAL COURT WHEN APPLYING THE LAW.

The District Judge stated in his opinion, 184 F. Supp. 950, 956:

> "* * * In refraining from giving the required three-blast signal when the draw commenced to open, and in giving instead a two-blast signal Peschken said he was following his usual practice. * * *."

Mr. Peschken's actual testimony is as follows (a78):

> "Q. Now, you have testified, Mr. Peschken, that (193) you did not at the time of this accident give the three-blast signal on starting to open the span, and you also testified that instead you did in fact give a two-blast signal. Is that your customary procedure whenever you operate the drawbridge?
>
> A. Yes.
>
> Q. I couldn't hear your answer.
>
> A. It is.
>
> Q. So that there was nothing abnormal at all about your procedure in this particular case?
>
> A. Not a thing."

(a82):

> "Q. And rule 3 states, does it not, Mr. Peschken, 'On vertical bridges, three blasts of the siren are to be given (four blasts for Government craft) when the span starts to rise', and so on; is that not true, sir? (288) A. That's right.
>
> Q. And you testified that, in fact, you do not observe that regulation as a matter of course? A. That's right."

Respondent argues that the new principle of law (page 7) "is that the constant use of the two-blast signal by the bridge permits the vessel to ignore the warning of delay significance given that signal *by the regulations of the Secretary of the Army* (emphasis added) and permits the vessel to come ahead as if a three-blast signal had been given or as if no warning delay signal had been given."

The argument is unique in that it permits the bridge tender to customarily sound the wrong signal with impunity and yet hold a vessel liable by labeling that signal as a "warning" when, in practice, it was not used as a warning and when, in fact, a different warning signal was promulgated by the State Highway Department.

Respondent points out that the pilot aboard the LEMBULUS, Captain John Bassett, was dead and therefore it is not known whether he knew of the bridge tender's custom and whether he knew of the prior mechanical difficulty on the bridge. Respondent further argues that if Captain Bassett knew of the respondent's custom then he probably also knew of the mechanical difficulty on the bridge. The argument is untenable.

The practice of sounding the wrong signal is a custom prevalent throughout New York Harbor, as shown by New York City's rules on the subject (Appendix E) and by respondent's own testimony.

It is highly unlikely that Captain Bassett, who was so well known as a harbor pilot that his obituary was printed in the New York Times on April 28, 1959 (Appendix K, attached hereto), did not know of the custom.

On the other hand, there was only one mechanical failure of the bridge which apparently occurred during normal operations. The other failures were induced while trying to diagnose the trouble (79a-81a).

Under these circumstances it would be highly unreasonable to suppose that Captain Bassett had equal opportunity

to know both of the customs of the harbor and the fact that a specific bridge had had trouble on one occasion, especially when that trouble was not being publicized (81a).

A Court could very well find, under the authority of *McAllister* v. *United States*, 348 U. S. 19, that respondent's signal to the LEMBULUS was meaningless as a matter of fact.

To reiterate, the Court of Appeals for the Fourth Circuit in the *Majestic*, 80 F. 2d 879, page 881, treated a similar situation as a question of fact and affirmed the District Court.[1] The Third Circuit should have done the same in this case.

CONCLUSION

The petition should be granted

Respectfully submitted,

ROBERT M. JULIAN,
Counsel for Petitioner.

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[1]It appears that a principle of the law of procedure to be postulated from the *Clement*, *Monroe* and *Sightseer VIII* cases is that the bridge tender bears the burden of proving adequate warning to an approaching vessel of any danger to said vessel arising from the operation of the bridge. The respondent in this case failed to carry the burden of proof because he gave no warning at all other than his usual, customary meaningless signal and the District Court was correct in holding him liable.

NEW YORK TIMES

APRIL 28, 1959.

JOHN A. BASSETT, HARBOR PILOT, 63

Docking Guide With Moran Towing Dies—Saved Ship in Brooklyn Pier Fire

Capt. John A. Bassett

Capt. John A. Bassett of 1124 Banner Avenue, Brooklyn, a New York Harbor pilot with the Moran Towing and Transportation Company, Inc., died on Saturday at the United States Public Health Service Hospital at Richmond, S. I. He was 63 years old.

Captain Bassett played a key role on D-Day, June 6, 1944, when, on active duty with the Navy Construction Battalion, he had charge of towing many parts for artificial harbors from England to France, where they were set in place under very heavy enemy fire off Omaha Beach.

On Dec. 3, 1956, Captain Bassett was driving to his home, when he saw fire engines racing to the Luckenbach pier at the foot of Thirty-fifth Street, Brooklyn. He followed them onto the pier, where he was caught and injured by a heavy explosion.

Despite his injuries, he took the helm of the freighter African Grove, berthed at the next pier, and steered her into the safety of the harbor.

A native of Tampa, Fla., Captain Bassett started his career as an apprentice seaman on the three-masted schooner City of Tampa, which carried cedar logs from the West Indies to Pensacola, Fla. He later was a quartermaster on the Old Dominion Line steamer Monroe, plying between New York and Norfolk, Va.

Captain Bassett left that post to become a tugman in New York Harbor. He was a mate with the Card Towing Line, and later joined the Olsen Water and Towing Company, which was merged with Moran in 1950.

He leaves his wife, Nellie; three sons, Edward, Albert and Adam, and six grandchildren.

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OPPOSITION TO MOTIONS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEFS

DAVID D. FURMAN,
Attorney General of New Jersey,
Attorney for Respondent, Charles Peschken,
State House Annex,
Trenton, New Jersey.

THEODORE I. BOTTER,
Assistant Attorney General,
Of Counsel.

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